

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. M-05/12-314  
 )  
 Appeal of )

# INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) that she abused and financially exploited a vulnerable adult WM. The issue is whether DAIL can show by a preponderance of the evidence that petitioner's actions constitute abuse or financial exploitation as those terms are defined in 33 V.S.A. § 6902.

## Procedural History

The petitioner filed for fair hearing on May 24, 2012. A telephone status conference was held on June 25, 2012. The parties represented that certain facts were not in dispute. The parties were given a deadline to submit a stipulation of facts and the hearing was scheduled for August 1, 2012.

DAIL filed a Motion for Summary Judgment on July 13, 2012 dealing with the allegations of financial exploitation. The hearing was cancelled and a briefing deadline set.

The Hearing Officer entered an Entry Order September 18, 2012 denying DAIL's Motion for Summary Judgment as a matter

of law, finding WM is a vulnerable adult, and incorporating facts from DAIL's Motion.

A telephone status conference was held on October 2, 2012 scheduling the case for hearing. Hearing was held on November 20, 2012.

DAIL presented testimony from (1) WM, (2) AH, licensed psychologist, and (3) SN, Adult Protective Services investigator. The petitioner testified on her own behalf.

The following exhibits were entered into evidence on behalf of petitioner: (1) petitioner's No. 1-8, a series of exterior and interior photographs of petitioner's home where WM resided and (2) Petitioner's No. 9, a letter by JR, an employee of the Department for Children and Families. DAIL's Exhibit No. 1 (the investigator's report) was admitted for the limited purpose of confirming the actions taken by DAIL during the investigation.

The decision is based on the evidence adduced through Motion and Hearing.

FINDINGS OF FACT

1. The petitioner's late cousin, VM, was married to WM, the vulnerable adult in this case.

2. The petitioner is a registered foster care parent and has provided foster care for approximately sixteen years.

3. WM is now forty-nine years old; she is diagnosed with Parkinson's disease. WM is unsteady on her feet. WM is the mother of JM who was five years old at the time they moved into petitioner's household.

4. WM receives Social Security Disability benefits. Her son also receives Social Security Disability benefits.

5. WM has a representative payee for her Social Security disability benefits because of difficulties she has managing her funds. Petitioner became WM's representative payee after WM moved into her household. Petitioner is no longer WM's representative payee.

6. WM is a vulnerable adult under the definition of 33 V.S.A. § 6902(14)(D)(i).

7. WM and JM moved into petitioner's household during August 2010.

At that time, WM and JM were homeless. They had lived in another person's apartment in Vershire for about six to

seven months and were about to move into an apartment in the same building.

WM and JM needed to leave the apartment on the advice of her attorney from Have Justice Will Travel (HJWT) because they were not safe there. They left most of their belongings in the apartment they just started to rent.

WM and JM went into a shelter for one night but the shelter did not work out for them. WM and JM went to another's household but there was not enough room. There was concern that JM could go into the custody of the Department for Children and Families.

During this time, WM's attorney and petitioner's sister-in-law contacted petitioner several times to see if petitioner would take WM and JM into her home. The petitioner, at first, declined. The petitioner was providing foster care to two boys with special needs. Petitioner was prevailed upon to take WM and JM at a point when they faced going back into a shelter.

8. When WM and JM moved into petitioner's home, they had the clothes they took with them when they went into a shelter. Most of their belongings were left in Vershire.

Petitioner helped WM retrieve her belongings from Vershire. WM and JM's clothing were ruined due to a leak

from the apartment above. WM and JM needed to replace clothing and petitioner helped them do so.

Petitioner rented the vans to move WM's belongings to storage. Petitioner helped WM and JM go shopping for replacement clothing and for a rubber mattress. Petitioner fronted a number of expenses and she was reimbursed by WM for these costs.

WM did not have a car. Petitioner took WM and JM to appointments. Petitioner set up Ticket to Ride several months later to help petitioner with transportation. Petitioner helped set up counseling for JM and suggested counseling for WM.

9. Petitioner informed WM and her attorney that WM would be charged \$750 per month for rent and utilities. The testimony did not spell out what utilities were covered in this arrangement. The rent would be for two bedrooms and use of the common areas. The bedrooms had television sets. At times, the rent has been characterized as \$650 per month plus a sum for utilities. In all, petitioner was collecting \$750 per month for both the rent and utilities. WM indicated that the amount she paid petitioner was the same that she paid when she lived in a person's apartment in Vershire.

10. Petitioner and her husband live in a large two-story home that has several bedrooms on each floor. The parties agree that the home is well maintained.

11. During August 2010, petitioner was a foster parent for two boys. One boy was a seventeen-year-old sex offender, and petitioner knew that the Department for Children and Families (DCF) would remove him after notification that a young boy was moving into her home. Petitioner testified she received \$2,400 per month for his foster care. This boy was removed by DCF within a few weeks of WM moving into petitioner's home. The other boy was disabled and had personal care attendants to help with his care; petitioner testified she received \$4,000 per month for his care and he remained in petitioner's home until February 2011.

Adult Protective Service Complaint-Assault

12. AH is a licensed psychologist-masters level who is employed by a local mental health agency. As part of her duties, AH co-facilitates a group for trauma victims. The group meets weekly for eight weeks for sessions lasting 1.5 hours; members can continue with the next group. The goal is to help group members deal with the impacts of trauma. AH's testimony is credible including her description of WM's demeanor and WM's account on October 11, 2011.

13. WM was a member of a group that AH co-facilitated. The group met on Tuesdays.

14. AH first met WM on May 31, 2011.

15. On October 11, 2011, WM arrived at her group late. The driver from the transportation service came in with WM to the group. Since the group meetings are confidential, AH took them to another room. AH received WM's consent to speak to the driver.

16. AH explained that the driver was concerned for WM's safety. AH spoke with WM. AH described WM as crying, upset, and shaking more than WM ordinarily shakes due to her Parkinson's disease. AH explained that when WM was upset during a group, WM would become shakier and initially have difficulty speaking.

AH asked WM why she did not feel safe and WM answered that on Sunday evening around 8:00 p.m., the petitioner pushed her back and that WM hit her head on the vacuum sweeper and fell on her elbow. AH observed that WM's elbow was bruised and skinned. The incident took place on October 9, 2011.

17. AH helped petitioner find alternate housing so she did not have to return to the petitioner's home. AH arranged for JM to be picked up after school. AH then filed an online

report to Adult Protective Services (APS) and called the Vermont State Police.

18. APS assigned the case to SN to investigate. SN started as an investigator with APS during July 2011. SN is an attorney.

19. SN interviewed WM and petitioner. SN interviewed AH. She interviewed petitioner's cousin, RM, who was a witness to the October 9, 2011 incident. SN did not interview the foster children who also witnessed the incident.

20. SN was in contact with Trooper MM who conducted the criminal investigation. As part of the criminal investigation, Trooper MM also interviewed the foster children who confirmed petitioner's account that she did not push WM. SN acknowledged that she learned from Trooper MM that charges were not being brought due to insufficient evidence.<sup>1</sup>

21. SN recommended that petitioner be substantiated for abuse.

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<sup>1</sup> It should be noted that the standard for criminal cases is a higher standard of proof than the standard used in substantiation cases.



October 9, 2011 Incident

22. The incident on October 9, 2011 took place after WM gave her son a shower in a bathroom on the second floor. The incident took place in the hallway outside the bathroom. There was a vacuum sweeper behind where WM was standing. Petitioner's Exhibit 8 depicts a narrow hallway.

23. Petitioner thought WM called petitioner a swear word, and petitioner confronted WM about this.

24. The incident was witnessed by RM and two foster children.

25. WM testified that petitioner talked to her and said WM called petitioner a particular swear word; WM denied calling petitioner the particular word. During their exchange, petitioner pushed her on the chest and she fell backward landing on her elbow and hitting her head. WM said her elbow was black and blue.

26. The petitioner testified that she was going up the stairs and overheard WM tell her son not to listen to petitioner and heard WM call petitioner a particular swear word. According to petitioner, one of the foster children heard WM also.

Petitioner approached WM after JM's shower and after JM was put to bed. Petitioner asked WM why she used the word

she did. When talking, petitioner became exasperated and flung her arms up in front of her but testified she did not touch WM. Petitioner testified that she understood why WM might think petitioner was going to hit her. According to petitioner, WM backed up and tripped over the vacuum sweeper and fell.

27. The testimony of WM and petitioner is equally persuasive.

Financial

28. SN started the investigation into financial exploitation because of questions she had about the rental arrangements and how petitioner handled her responsibilities as representative payee for WM. A representative payee stands as a fiduciary to the Social Security recipient.

29. When WM moved into petitioner's home, she did not have a representative payee as her last representative payee had been removed from that position due to the theft of approximately \$10,000 from WM's bank account. Because WM did not have a representative payee, she did not have access to her monies.

30. Petitioner was appointed representative payee for both WM and JM.

31. Once petitioner became representative payee, the Social Security Administration stopped the automatic deposit of checks for both WM and JM and, instead, sent the checks directly to petitioner.

32. When WM moved into petitioner's home, WM's Social Security Disability Benefit was \$760 per month. Petitioner's monthly benefit was reduced to \$645 effective January 2011 because she no longer received assistance for the cost of her Medicare Part B premium. Instead, the premium was deducted from WM's monthly benefit.

The parties did not testify to the amount of JM's monthly Social Security Disability benefit nor when JM's benefits started. WM and JM comprise a household of two. Their total monthly income is not clear.

In addition, there is testimony that WM and JM received 3SquaresVT (food stamps) through WM's EBT card but that petitioner did the grocery shopping for them and used the EBT card on their behalf.

33. During the investigation, SN checked WM and JM's bank records. On September 30, 2010, North Country Credit Union records show a newly opened count for WM Rep Payee [petitioner]. At that time, WM had assets totaling \$2,000 in her regular share account and \$2,950 in her "draft" or

checking account. In October 2011, the draft share balance stood at zero; the total assets were \$23.40 in the regular share account and \$98.51 in the draft account.

In September 2010. JM had assets amounting to \$4,684 on deposit with the credit union. In October 2011, he had a total of \$282.56 remaining in his accounts.

34. The evidence below deals with how part of WM's funds and JM's funds were used, the monies WM loaned to petitioner, and petitioner repaying WM. The evidence does not fully document how all of WM's monies were used. Petitioner did not keep a contemporaneous record of WM's and JM's funds. Petitioner did not give WM a written accounting. Monthly bank records were not put into evidence.

35. During the first month WM moved into petitioner's home, petitioner took the first month's rent, money to pay the storage facility holding WM's belongings, reimbursement for the mattress and moving expenses from the move from WM's account. During the remaining time WM resided with petitioner, petitioner routinely cashed WM's social security checks, and petitioner routinely kept the proceeds as payment for rent and expenses, rather than depositing the checks into WM's account.

36. Petitioner wrote checks to herself for \$100 each month from WM's representative payee account to cover utilities and to make up the full payment of \$750 for rent and utilities.

37. During December 2010, petitioner's husband became injured on the job and went on disability. Her husband's injury caused a significant decrease in their household income and a resulting strain on petitioner's ability to make ends meet.

38. On at least three occasions, petitioner wrote checks to herself from WM's representative payee account for \$50 per month as WM's share of the satellite television bill. The monthly bill was \$105. Petitioner requested permission to do this.

39. On at least three occasions, petitioner asked permission from WM to pay certain household bills including auto repairs, electricity bills, and phone bills.

40. WM's son, JM, was in summer school and petitioner drove him to school. Petitioner's car needed repairs. WM testified she helped with part of the car repair because petitioner was transporting JM to summer school.

41. Petitioner kept a landline for WM's use.

Petitioner did not need a landline because she used a cell phone. WM paid \$250 towards the telephone bill.

42. WM provided \$244 and \$156 towards two electric bills.

43. In August 2011, petitioner was behind in her mortgage and asked permission from WM to take \$1,268.62 from JM's account to pay part of her mortgage arrears. The petitioner and WM entered into a written agreement on August 17, 2011. Petitioner wrote the agreement. The agreement states:

I [WM] have offered to pay Northfield Savings Bank one payment of One Thousand Two Hundred Sixty Eight Dollars and Two Cents. I feel that this is in [JM's] best interest. Also, the [petitioner and her husband] agree to repay these funds as soon as economically possible. I have entered into this agreement of my own free will.

The signatures of both petitioner and WM are witnessed by two other people.

44. WM testified that she did not mind the loans because petitioner provided a home for them. She testified she understood the amounts and that she was not afraid of petitioner. She did not expect interest. WM was sincere when she testified about helping petitioner and not being bothered by doing so because petitioner provided her housing.

45. The petitioner has paid back all monies borrowed to pay her household bills. The petitioner has not paid interest on any loans. There are no provisions in the one written agreement or elsewhere for the payment of interest. Petitioner sent November 2011 checks back to SSA and closed accounts and sent monies to SSA.

ORDER

DAIL's decision to substantiate abuse is reversed and DAIL's decision to substantiate exploitation is affirmed.

REASONS

By statute, the Commissioner of DAIL is required to investigate allegations of abuse, neglect or exploitation of vulnerable adults, and to keep the cases that are substantiated in a registry under the name of the person who committed the abuse, neglect or exploitation. 33 V.S.A. §§ 6906 and 6911(b). The law's purpose is to "protect vulnerable adults whose health and welfare may be adversely affected through abuse, neglect or exploitation". 33 V.S.A. § 6901.

Once DAIL substantiates abuse or exploitation of a vulnerable adult, the person who has been substantiated may apply to the Human Services Board for relief. 33 V.S.A. §

6906(d). The hearing before the Board is de novo. DAIL bears the burden of proof to show by a preponderance of evidence that the petitioner's behavior meets the criteria for abuse or exploitation.

The definitions for abuse and exploitation are set out in 33 V.S.A. § 6902(1) as follows:

(1) "Abuse" means:

(A) Any treatment of a vulnerable adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to a vulnerable adult;

. . . .

(6) "Exploitation" means:

(A) Willfully using, withholding, transferring, or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another;

(B) Acquiring possession or control of an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, duress, or fraud;

At hearing, the parties focused on whether petitioner pushed WM causing her to fall and injure herself.

The petitioner confronted WM in a narrow hallway. There was a vacuum sweeper in the hallway behind WM. Due to WM's Parkinson's disease, WM was and is not steady on her feet.



WM did fall and sustained a bruise on her elbow and hit her head.

WM has been consistent about petitioner pushing her backwards. In response, petitioner has been consistent that she did not push WM. Their testimony at hearing was equally persuasive. As a result, DAIL has not sustained its burden that petitioner abused WM.

In contrast, financial exploitation can be found. Under 33 V.S.A. § 6902(6)(A), DAIL must show by a preponderance of evidence that petitioner (1) willfully used WM's monies, (2) had no authority to do so or acted without the legal authority to do so and (3) for petitioner's own wrongful advantage. Under 33 V.S.A. § 6902(6)(B), DAIL must show by a preponderance of evidence that petitioner's gained control of WM's monies through either undue influence, harassment, fraud or duress.

Petitioner became WM's representative payee at a time WM had no representative payee and could not access her money as a result. Petitioner needed a representative payee because she cannot manage her monies. The representative payee stands as a fiduciary to ensure that a recipient's monies are used for the recipient's needs. A representative payee's duties include keeping records of both receipt of benefits

and how those benefits are spent.<sup>2</sup> 20 C.F.R. §§ 404.2035 & 404.2040.

Petitioner did not keep contemporaneous records and, for the most part, she cashed WM's Social Security checks rather than deposit these checks into WM's account.

Petitioner found herself financially strapped due to a number of circumstances. At that time, petitioner requested help from WM to pay certain expenses including the telephone, car repairs, electricity, and for television service. Petitioner asked WM to take funds from JM's account to pay towards her mortgage.

WM agreed to the specific loan requests. WM was sincere in her testimony that she agreed to the loan requests because petitioner was housing her.

The question still remains whether WM was exploited or taken advantage of despite her agreement to petitioner's requests. There is a power differential between WM and petitioner. Petitioner was WM's landlord. WM relied on petitioner for housing. WM had a representative payee because she was not capable of managing her monies. WM

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<sup>2</sup>See [www.ssa.gov/payee/faqrep.htm](http://www.ssa.gov/payee/faqrep.htm).

relied on petitioner for the proper use of her monies. WM's reliance was misplaced.

DAIL can show by a preponderance of evidence that petitioner used undue influence to financially exploit WM pursuant to 33 V.S.A. § 6902(6)(B).

In conclusion, DAIL's decision to substantiate petitioner for abuse of a vulnerable adult is reversed and DAIL's decision to substantiate petitioner for financial exploitation of a vulnerable adult is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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